Supreme Court, U.S.
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No. 09-319

In The

Supreme Court of the United States

STEVEN LACEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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September 10, 2009

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QUESTIONS PRESENTED

1. Is a court entitled to rely upon multiple layers of hearsay for enhancing a defendant's sentence?

2. Are the Child Pornography Sentencing Guidelines due any deference given their manipulation by Congress and the Department of Justice over the past two decades?

3. Does the Federal Government have jurisdiction over Child Pornography cases when there is no evidence any material subject to the indictment traveled in Interstate Commerce?

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Mr. Steve Lane Lacey respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the District Court of the Southern District of Illinois and the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

This case began in the United States District Court in the Southern District of Illinois. Lacey plead guilty and was sentenced by the District Court. Appendix B. His sentence and the District Court's ruling on his objections to the Pre-Sentence Report were appealed to United States Court of Appeals for the Seventh Circuit. Appendix A. The court rejected Lacey's assignments of error. Id.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on June 12, 2009. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257. Petitioner properly invokes the jurisdiction of this Honorable Court by filing the instant Petition on or before September 10, 2009.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service

> in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 11, 2007, a grand jury returned a one-count indictment charging Lacey with knowingly possessing a computer hard drive, computer disk, and other material that contained images of child pornography in violation of 18 U.S.C. section 2252(a)(5)(B). Specifically, the indictment referenced four files as the possessed contraband. Lacey plead guilty to that one count, without a plea agreement, and was sentenced to one hundred and eight months, a special assessment of one hundred ($100.00) dollars, lifetime supervised release, and a fine of seventeen thousand five hundred ($17,500.00) dollars. The court's more than minimum sentence was based upon its consideration of a variety of unauthenticated images it visually examined and determined were not altered images. Lacey filed timely filed a notice of appeal. His assignments of error were all rejected by the Court of Appeals. This appeal followed.

SUMMARY OF ARGUMENT

The Child Pornography Sentencing Guidelines are entitled to no deference by the District Court due to their improper manipulation by Congress and the Department of Justice since their inception.

The District Court improperly considered unauthenticated and constitutionally protected images as the basis for enhancing Lacey's sentence beyond the statutory minimum. Lacey's nine year sentence for possession of four images is outside the heartland of

cases and unreasonable in light of the purposes and principles of sentencing set forth in the federal statutes.

The District Court lacked jurisdiction in this matter as the Government failed to establish it had jurisdiction to charge Lacey with a violation of the federal child pornography statute.

ARGUMENT

The Government's Pre Sentence Investigation (PSR) in this case , submitted to the judge, proposed a sentencing guideline calculation as follows:

Factor		Total
Base Offense		18
Possessed Images depicting actual minors under the age of 12		2
Offense involved the distribution of images for receipt of value		5
Possessed Images depicting sadistic or masochistic conduct		4
A computer was used by Lacey		2
Possessed images numbering more than 600		5
	Subtotal	36
Reductions		
Acceptance of Responsibility		-3
	Total	33

Lacey filed objections to that calculation in the PSR based upon various grounds noted below. Lacey's proposed guideline calculation was as follows:

Factor		Total
Base Offense		18
Possessed images depicting actual minors under the age of 12		2
~~Offense involved the distribution of images for receipt of value~~		5
~~Possessed images depicting sadistic or masochistic conduct~~		4
A computer was used by Lacey		2
~~Possessed images numbering more than 600~~		5
	Subtotal	22
Reductions		
Acceptance of Responsibility		-3
	Total	19

The court adopted the government's guideline range calculation. Appendix C. That guideline range of 33 mandated a sentence of between 135-168 months. Id. This guideline range was beyond the maximum sentence for the offense which is 120 months. The court ultimately sentenced Lacey to one year shy of the maximum. This anomaly of a guideline calculation exceeding the statutory maximum is now common in child pornography cases -- and with good reason -- the punishment in years for such offenses has been increased more than 1,500% in the past decade via various non-Sentencing Commission manipulations of the guidelines themselves.

A. THE CHILD PORNOGRAPHY SENTENCING GUIDELINES IMPOSED TOUGHER PENALTIES FROM THEIR INCEPTION

On November 29, 1990, Congress criminalized child pornography possession. See Pub.L. 101-647, Title III, § 323(a), (b), Nov. 29, 1990, 104 Stat. 4818, 4819. In 1990, the United States Sentencing Commission, the legislatively mandated author of the Sentencing Guidelines, established the base offense for child pornography possession. See 56 FR 1846-01, 1991 WL 310646 (F.R.). The Commission determined it was inadvisable to introduce more severe penalties. Id. In a letter to Congress, the Commission explained its position: '[These new guidelines] require substantially tougher penalties than...imposed...pre-guidelines." Id.

B. RELIGIOUS ORGANIZATIONS AND SENATOR HELMS FORCE MORE SEVERE PENALTIES VIA GUIDELINE MANIPULATION

In 1991, Senator Jesse Helms received letters from two religious organizations objecting to the proposed guidelines. See Exhibit 2, 137 Cong. Rec. S10322-04. On July 18, 1991, while most senators were in committee meetings, Senators Domenici and Helms briefly re-opened debate on House Resolution 2622, the Treasury-Postal Service Appropriations Bill of 1991. See 137 Cong. Rec. S10322-04. Without objection, since no other senators were present, Senator Helms took the floor and proposed "Amendment Number 780 (Purpose: To ensure that criminals convicted of child pornography offenses serve time in prison). Id. This amendment mandated changed to the sentencing guidelines. Id. The amendment was included with the

appropriations bill approved by a 99-0 vote. See Treasury, Postal Service, Executive Office of the President, and Independent Agencies Appropriations, Fiscal Year 1992, 137 Cong. Rec. S10356-01, S10363.

C. THE CHAIR OF THE SENTENCING COMMISSION OBJECTS

The Chair of the Commission objected to the amendments in a letter to Congress.

> **Senate Amendment No. 780, unfortunately, would negate the Commission's carefully structured efforts to treat similar conduct similarly and to provide proportionality among different grades of seriousness of these offenses. Instead, it would require the Commission to rewrite the guidelines for these offenses in a manner that will reintroduce sentencing disparity among similar defendants.....One primary reason Congress created the Sentencing Commission was to devise guidelines that avoid these unwarranted variations in sentencing for similar conduct. Amendment No. 780 will reintroduce the very problems the guidelines now prevent. Id.**

Amendment 780 rejected the empirical, studied approach to child pornography sentencing. Amendment 780 made the base offense level for mere possession equal to what it was for trafficking in child pornography just one day earlier.

In 1995, 1998, 2000, and 2003, Congress legislated more sentencing guideline changes affecting all defendants today. See Amendments 535, 575, 592, 649 and 661, U.S.S.G. App. C. These guidelines modifications intended to combat repeat abusers, pornography producers, and mass distributors. The methodology behind this tinkering applies to less than 5% of current defendants and certainly not to Lacey.

The guidelines are entitled to no deference in application to Lacey as a result. For Lacey, the applied Base Offense Level and specific offense enhancements are predicated upon a series of premises which do not exist. Without a demonstration that the defendant was involved in the behavior targeted by Congress, the only remaining data is that which supported the Base Offense Levels of November 1, 1991. In this environment, respect for the Guidelines should have been withheld.

D. THE DEPARTMENT OF JUSTICE SURREPTITIOUSLY INSERTS MORE SEVERE PENALTIES INTO THE GUIDELINES YET AGAIN

In 2003, two attorneys at the Department of Justice convinced a novice Congressman, Tom Feeney, to insert drastic changes to the child pornography Guidelines into an unrelated, popular bill, without notice to the Sentencing Commission. See Skye Phillips, Protect Downward Departures: Congress and the Executive's Intrusion Into Judicial Independence, 12 J.L. & Pol'y 947, 976-984 (2004) (hereinafter Phillips) at 983 n. 185, 986.

Representative Feeney admitted being the "messenger" for two Justice Department officials authoring the provision and chose not to notify or consult the Sentencing Commission. Phillips, at 983 n. 185, 986. Debate on the amendment was limited to twenty minutes. Id. at 983.

That the Feeney Amendment received virtually no attention or debate is inexplicable unless one assumes that it was produced at a time and in a way designed to escape detection and debate before its passage. See Materials From Interested Groups Opposing Original Feeney Amendment at 15 Fed. Sent. R. 346, 2003 WL 22208850 (Vera Inst. Just.)

E. GUIDELINES MANIPULATION NOW OBSCURES CONGRESSIONAL INTENT MANDATES NEAR MAXIMUM SENTENCE IN ALL CASES

The flaw with U.S.S.G. § 2G2.2 today is that the average defendant charts at the statutory maximum, regardless of Acceptance of Responsibility and Criminal History. Lacey is a prime example of this. He plead guilty to possession of four images and the guideline range, according to the District court, exceeded ten years! As noted by the Guidelines Commission, there are "several specific offense characteristics which are expected to apply in almost every case (e.g. use of a computer, material involving children under 12 years of age, number of images)." See Amendment 664 to United States Sentencing Guidelines, (November 1, 2004). The internet provides the typical means of obtaining child pornography, resulting in a two-level enhancement for use of a computer. See U.S.S.G. § 2G2.2(b)(6).

Furthermore, as a result of internet swapping, defendants readily obtain 600 images with minimal effort, resulting in a five-level increase. See U.S.S.G. § 2G2.2(b)(7)(D). The 2004 Guidelines created an Application Note defining any videoclip as creating 75 images. See U.S.S.G. § 2G2.2, App. Note 4(ii). Thus one email containing eight, three-second video clips would also trigger a five-level increase. Undoubtedly, as the Commission recognized, some of these images will contain material involving a prepubescent minor and/or material involving depictions of violence (which may not include "violence" per se, but simply consist of the prepubescent minor engaged in a sex act), thereby requiring an additional six-level increase. See U.S.S.G. § 2G2.2(b)(2),(4). In all of this unscientific guideline tinkering, where is Congress' intent to provide a minimum sentence for some defendants?

Consider the results of these Congressionally directed and influenced changes as they apply to two hypothetical, but statistically typical defendants. Quoted statistics are derived from the 2007 Sourcebook, http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm.

Defendant #1.

Convicted of distributing child pornography. Sentenced pursuant § 2G2.2.
Specific Offense Characteristics:

- Possessed a picture depicting a child under the age of 12 (96.2%)
- Used a computer (96.8 % of defendants)
- Possessed one picture involving bondage (63.2%)
- Emailed 5 pictures to another person in expectation of getting 5 pictures back

(49.4% of defendants receive some type of distribution enhancement)

- Possessed four short movie clips and ten pictures resulting in a calculated 310 pictures (53.6 % had greater than 300, 85.5% had greater than 10)

Defendant #1 has no criminal history and has never abused or exploited a child.
He pleads guilty in a timely fashion and receives the maximum standard reduction for acceptance of responsibility.

This defendant's guideline range over time:

April 30, 1987: 12-18 months
November 1, 1991: 21-27 months
November 27, 1991: 27-33 months
November 1, 1996: 41-51 months
November 1, 2000: 70-87 months
April 30, 2003: 108-135 months
November 1, 2004: 188-235 months

This represents a 1,567% increase in the sentence for a child pornography possessor since 1987. There are no empirical studies justifying the need to punish such defendants more harshly in 2009 than they were in 1987 by any percentage much less more than 1,500%.

In United States v. Kane, 470 F.3d 1277 (8th Cir. 2006) the court considered the savage behavior of a man named Champion. He paid to have a mother hold down her nine year-old child while Champion raped the young girl twice a week for two years. During these rapes, the child experienced such trauma she passed out. The damage to the child physically and emotionally is unimaginable. Using the Guidelines, applying all enhancements, and granting only

Acceptance of Responsibility, the court determined the Guideline range was 151-188 months. Id. at 1282. That the Guidelines would potentially qualify Lacey for more severe punishment for possession of four images versus Champion's horrific behavior is illogical and supports no deference to the guidelines for Lacey's sentence calculation.

F. COURT'S NEED TO DISREGARD GUIDELINES IN CHILD PORNOGRAPHY CASES

A sentencing judge must independently evaluate the appropriate sentence in light of the Section 3553(a) purposes and factors, and must consider arguments that the guidelines should not apply on general policy grounds, case-specific grounds (including guideline-sanctioned departures), or "regardless." Rita v. United States, 127 S. Ct. 2456 at 2463. (2007). The judge "may not presume that the Guidelines range is reasonable." Gall v. United States, 128 S. Ct. 586 (2007). The District Court here simply bowed to the government's guideline calculation.

"[N]ot all of the Guidelines are tied to...empirical evidence." Gall, 1287 S. Ct. at 594 n.2. Where, as here, we can demonstrate that the Guidelines were dramatically skewed upwards by the efforts of two DOJ attorneys, who used a novice Congressman to backdoor changes into a major bill, over the objection of the Sentencing Commission, which specifically stated that no careful study or review had been allowed, then the assumption of careful study becomes unfounded, and the resulting Guideline is worthy of little respect.

Although some guidelines may be entitled to deference, this does not pertain to the child pornography guidelines that "do not exemplify the Commission's exercise of its characteristic institutional role." Kimbrough v. United States, 128 S. Ct. 558, 575 (2007). Where, as here, the Commission is merely parroting the directives of Congress, which in turn admits that it was merely enacting an undebated item written by federal prosecutors, then little respect is due.

"Because . . . the Guidelines for child [pornography] offenses, like the drug-trafficking Guidelines, were not developed under the empirical approach, but . . . in response to statutory directives. . . . the court affords them less deference than it would to empirically-grounded guidelines."). See Mistretta v. United States, 488 U.S. 361 at 407. (1989). If it were otherwise, the Separation of Powers problem that most troubled the Court in Mistretta would arise.

The Sentencing Guidelines in child pornography cases yield a sentence 'greater than necessary' to achieve §3553(a)'s purposes.

G. THE DISTRICT COURT IMPROPERLY RELIED UPON UNAUTHENTICATED IMAGES AND HEARSAY TO ENHANCE LACEY'S SENTENCE

Even if this Court feels the manipulated child pornography guidelines are even properly considered advisory, the District Court improperly applied various enhancements to that calculation relying on multiple levels of hearsay.

Lacey was indicted on one count of possession of child pornography, specifically, four separate images. He plead guilty to the indictment on February 1, 2008 with no plea agreement. As a result of his plea, he waived significant constitutional and trial rights and the government avoided the time, expense and risk of a trial.

Lacey's plea logically means he accepts the government's representations about the four above-mentioned images and that they meet one of the definitions of "child pornography" contained in 18 U.S.C. 2256(8). The indictment nor plea contains any other admissions or agreements.

H. ADVISORY NATURE OF GUIDELINES AND SENTENCING FACTORS

On January 12, 2005, this court ruled that its Sixth Amendment holding in Blakely v. Washington, 542 U.S. 296 (2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000), applies to the Federal Sentencing Guidelines. United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005). Accordingly, reaffirming its holding in Apprendi, this Court concluded that

> [a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

(Id. at 756) (Emphasis added).

This Court made the Guidelines "effectively advisory." (Id. at 757).

Sentencing courts must treat the guidelines as just one of a number of sentencing factors set forth in 18 U.S.C. §3553(a). Booker.

The primary directive in § 3553(a) is for sentencing courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2." When considering whether Lacey's 9 years in prison for possession of four images, section 3553(a)(2) states that such purposes are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining the minimally sufficient sentence, §3553(a) further directs sentencing courts to consider the following factors:

> 1) the nature and circumstances of the offense and the history and characteristics of the defendant (§3553(a)(1));

2) the kinds of sentences available (§3553(a)(3));

3) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (§3553(a)(6)); and

4) the need to provide restitution to any victims of the offense. (§3553(a)(7)).

Other statutory sections also give the district court direction in sentencing. Under 18 U.S.C. §3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to "recognize[s] that imprisonment is not an appropriate means of promoting correction and rehabilitation."

I. THE DISTRICT COURT HERE, UNCRITICALLY APPLIED THE GUIDELINES.

The directives of Booker and §3553(a) make clear that courts may no longer uncritically apply the guidelines. Such an approach would be "inconsistent with the holdings of the merits majority in Booker, rejecting mandatory guideline sentences based on judicial fact-finding and the remedial majority in Booker, directing courts to consider all of the §3553(a) factors, many of which the guidelines either reject or ignore." (United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wisc. 2005). See also United States v. Ameline, 400 F.3d 646, 655-56 (9th Cir. 2005) (advisory guideline range is "only one of many factors that a sentencing judgment must consider in determining an appropriate

individualized sentence"), reh'g en banc granted, 401 F.3d 1007 (9th Cir. 2005)). Justice Scalia explains the point well in his dissent from Booker's remedial holding:

> Thus, the logic compels the conclusion that the sentencing judge, after considering the recited factors (including the guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise – if it thought the Guidelines not only had to be 'considered' (as the amputated statute requires) but had generally to be followed – its opinion would surely say so.

(Booker, 125 S. Ct. at 791 (Scalia, J., dissenting in part)). Likewise, if the remedial majority thought the guidelines had to be given "heavy weight", its opinion would have said so. The remedial majority clearly understood that giving any special weight to the guideline range relative to the other Section 3553(a) factors would violate the Sixth Amendment.

In sum, in every case, a sentencing court must now consider all of the §3553(a) factors, not just the guidelines, in determining a sentence that is sufficient but not greater than necessary to meet the goals of sentencing. And where the guidelines conflict with other sentencing factors set forth in §3553(a), these statutory sentencing factors should generally trump the guidelines. (See United States v. Denardi, 892 F.2d 269, 276-77 (3rd Cir. 1989) (Becker, J., concurring in part, dissenting in part) (arguing that since §3553(a) requires sentence be no greater than necessary to meet four purposes of sentencing, imposition of sentence

greater than necessary to meet those purposes violates statute and is reversible even if within guideline range)).

J. PRESENTENCE REPORT

The presentence report contains numerous factual claims that are inaccurate or that are inappropriate for the court's consideration under either the guidelines or statutory factors of §3553(a). They were all objected to by Lacey. The court relied on these items in sentencing Lacey despite his objection.

Paragraphs 4-12 of the PSR detail claims made by the government and law enforcement officers as to what was or was not said by Lacey at various times during the investigation. None of those facts were "facts established by [Lacey's] plea of guilty." (Apprendi at 756). Paragraph 13 details the four images to which Lacey plead guilty to possessing during his plea hearing. Those facts were established by Lacey's guilty plea as they are detailed in the sole count of the indictment.

Paragraph 14 of the PSR claims a variety of things not established by Lacey's plea of guilty.

1. That Lacey's computer had more than 5000 images of what appeared to be child pornography

2. That the over 5000 images depicted actual minors

3. That the over 5000 images depicted those actual minors actually engaged in the conduct depicted

Paragraph 15, likewise, lists a variety of things not established by Lacey's plea of guilty.

1. That Lacey's computer had images (i.e. plural) of a pre-pubescent minor engaged in prohibited conduct.

Lacey's plea established he had two images of pre-pubescent minors engaged in or about to be engaged in prohibited conduct. Likewise, the claim in the PSR that Lacey had images (plural) depicting sadomasochistic conduct is contradicted by the facts established by his guilty plea. That plea was to Count 1 containing only four images none of which are described as depicting such conduct.

Despite hearsay being permitted at sentencing hearings, not all consideration of hearsay testimony at sentencing proceedings is permissible. The Due Process Clause "is plainly implicated at sentencing," even though it does not require at sentencing "all the procedural safeguards and strict evidentiary limitations of the criminal trial itself." United States v. Fatico, 603 F.2d 1053, 1054 (2d Cir. 1979); United States v. Egge, 223 F.3d 1128, 1132 (9th Cir. 2000) ("Although the Confrontation Clause does not apply at sentencing, a defendant clearly has a due process right not to be sentenced on the basis of materially incorrect information. Due process requires that some minimal indicia of reliability accompany a hearsay statement.")

Lacey "has a due process right to be sentenced on the basis of reliable information" United States v. Tucker, 404 U.S. 443 (1972).

K. IMAGE COUNTS

The claim that Lacey's computer contained more than 5000 images is pure hearsay. At trial, the government would have had to prove the authenticity of each of these images and that each one depicted an actual minor engaged in the conduct depicted. This is an arduous task, if it is even possible, to say the least. The government avoided the labor, expense and risk of failing at proving those 5000 images when Lacey plead guilty. The use of this hearsay at sentencing, to increase Lacey's guideline calculation, is an end run around Lacey's significant abandonment of his trial rights. In fact, allowing this hearsay at sentencing essentially makes sentencing much easier than trial for the government permitting the admission of evidence the government, in all likelihood, would never have been able to prove at trial given the huge number of claimed images.

The image evidence is not merely hearsay, but double and in some cases, triple hearsay. It does not contain sufficient reliability even for a sentencing hearing. In addition, the use of such unreliable information impinges on Lacey's constitutional right, albeit repugnant, identified by the Supreme Court in Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389, 535 U.S. 234 (2002).

The U.S. Supreme Court has declared that citizens have a right to possess images that "appear to depict" minors engaged in prohibited conduct. (Id). No case law supports an enhancement or even consideration of constitutionally protected material as a basis for increasing the guideline range or underlying sentence for Lacey. It defines unfairness to increase a guideline

range or sentence based upon a citizen's possession of constitutionally protected material.

Therefore, before any consideration can be given for image content related to this case, the government must produce reliable information supporting a belief that the image depicts an actual minor actually engaged in the conduct depicted (i.e. is illegal child pornography) versus an image that merely "appears to be" illegal and is constitutionally protected. (See Free Speech Coalition). Although a typical sentencing only requires the mere preponderance standard, given the constitutional free speech implications in this case, that standard should be applied rigorously. Meaning, the presentation of no evidence or even some evidence should not be sufficient to meet the preponderance (51% in the government's favor) standard.

L. MULTIPLE LAYERS OF HEARSAY BEING OFFERED TO PROVE IMAGES DEPICT ACTUAL MINORS

The probation officer completing the PSR received the information regarding numbers of alleged contraband images on Lacey's computer from an investigator in Lacey's case. That investigator had no personal knowledge of the authenticity of any of the 5000 images. Paragraph 16 makes clear the investigator involved in the double hearsay information relied, still again, on another layer of hearsay.

M. THE OPERATION OF THE DATABASE

Paragraph 16 of the PSR purports to bolster the credibility of the government's claims about the

authenticity of the 5000+ images by reference to the National Center for Missing and Exploited Children (NCMEC) database. The government maintains more than one database of images of purported child sexual abuse. In this case, the PSR indicates the government relied on the database purportedly maintained by the NCMEC.

The database is often described as a repository of images and related information provided to it by law enforcement personnel from around the world relating to child sexual abuse cases in which images were created by the perpetrator. None of the database data is authenticated or vetted in any way. All NCMEC reports, including the one referenced in this case, contain a disclaimer at the top of each page clearly stating that NCMEC's report is not a verification of the age nor even the existence of the apparent person in any images described in the report. The database information is provided to it as described in Appendix D.

N. USE OF THE DATABASE IN THIS CASE

In this case, as in many others, investigators submitted copies of images purportedly found on Lacey's computer to the database as noted in the PSR in paragraph 16. A database employee then compared those submitted images with reference images in the database looking for matches. A report was produced detailing what, if any, matches exist between the submitted image copies and database images. What the database operator cannot provide is any evidence whether the reference images in the database are, themselves, even authentic. At least four layers of hearsay, then, support any claim by the government

that any images found on Lacey's computer used by the district court to justify a sentence beyond the minimum depict actual minors. Appendix D.

O. LAYERS OF HEARSAY

An alleged victim or perpetrator informs an investigator, let's say in Brazil, that images captured of child sexual abuse they participated in creating are real. That investigator copies those images and submits those copies to the database with perhaps an affidavit, judgment of conviction or other transcript. There is no set requirement of accompanying information and database images are associated with a wide variety of accompanying information. A suspect in the U.S. is arrested and indicted. Images from his computer are copied and sent to the database and matched to those from the Brazilian case. The investigator in that U.S. case is told by the database operator that images he submitted match those from a Brazilian case, previously submitted to the database.

In some cases, the Brazilian investigator is never told by either the alleged victim or alleged perpetrator the images he recovered (and subsequently submitted to the database) are authentic, but merely relies upon a jury finding of guilt in Brazil, guilty plea to some of the charges in the matter or other judicial findings. Of course, even a finding of guilt or a conviction or, in some cases, a confession by an alleged perpetrator is not proof that every image (or any image) seized is authentic. The claim by the author of the PSR about the 5000 images and their authenticity is, at best, triple or perhaps quadruple hearsay in some cases as noted in the illustration above. Moreover, the failure to clearly distinguish these images from realistic, but

legal, images that appear to depict a minor eviscerates the constitutional right outlined in Free Speech Coalition.

P. GOVERNMENT WITNESSES AND THE DISTRICT COURT LACK THE CAPACITY TO DETECT WHETHER A GIVEN IMAGE IS ALTERED (LEGAL) OR UNALTERED (ILLEGAL)

The government did not authenticate the images used to enhance Lacey's sentence. Therefore, there is no indicia of reliability that even the looser standards of sentencing hearings require.

The senior judge for the 1st Circuit recently held that it is impossible for anyone to know by looking what they are dealing with, i.e. constitutionally protected or felonious.

> Technological advances in recent years have been such that an untrained eye simply cannot easily distinguish a photograph of a real person from a virtual image by merely eyeballing the photographs in question. Indeed, determining whether an image is real or virtually created is not only no longer within the "range of normal experience and knowledge" of the average person, but it may also very well be difficult for even experts [to say] whether the pictures were made by using real children or by using computer imaging.... The scientific evidence available today is overwhelmingly contrary to that which existed in Nolan's day.... There is simply no question that today it is possible to create virtual images of humans that are

> indistinguishable from the real thing. (United States v. Wilder, 2008 WL 2009671 (1st Cir. May 12, 2008)).

This conclusion tracks several other cases in which government experts in digital imaging have testified likewise.

In United States v. Frabizio, 2006 WL 2384836 (D. Mass. Aug. 11, 2006) the government's leading digital imaging expert, Thomas Musheno of the FBI, admitted he lacked the capacity to determine if a given digital image was altered or unaltered. Musheno "conceded that it is possible to alter an image in a manner that is undetectable. He testified that because of this, he never opines that an image is real on the basis of a single image. In such cases, he limits his conclusions to 'appears to be real' and no conclusion." (Frabizio at 7).

Logically, persons with the same claimed expertise as Musheno lack the capacity to "determine whether the images involved" are protected or prohibited. Persons with less claimed expertise than Musheno, for example the District Court Judge in this case, also lack that capacity. No investigator or detective or Court has the capacity to reliably determine if any image in this case "are real images or images created or manipulated through digital technology." (Frabizio at 4). The District Court simply trampled on this court's "appears to be" exception from Free Speech Coalition, by enhancing Lacey's sentence based upon images that "appeared to be" the real thing -- to the District Court. As Lacey sits in prison, no one connected to this case knows whether any of the

images the court relied upon to enhance his sentence are contraband or not.

There is no federal or state decision, in which a government digital imaging expert witness has testified they have the capacity to know whether a given digital image is protected by the constitution or prohibited by the statute by visual examination. No government witness testified to that capacity in this case. Any claim the District Court can merely examine the images or videos for itself and "know" that they depict actual minors is technologically false.

Before the court's conclusion in Wilder and Musheno's concession of this lack of capacity in Frabizio, several other law enforcement digital imaging and computer experts also admitted this lack of capacity. United States v. Fox, 248 F.3d 394, 403 (5th Cir. 2001) (Government's computer expert conceded he lacked the capacity to know whether a person depicted in a digital image actually exists); United States v. Ellyson, 326 F.3d 522, 532 (4th Cir. 2003) (Government's agent testified he lacked the capacity to know whether some of the digital images possessed by the Defendant and introduced into evidence were created using actual minors or not); State v. May, 362 N.J.Super. 572, 829 A.2d 1106, 1111 (N.J.Super.Ct.App.Div.2003) (State's expert conceded his lack of capacity to distinguish between an actual minor in a digital image and a digital image of a minor that is created or manipulated using a computer).

As repugnant as apparent images of child pornography are, this Court protected their possession. (Free Speech Coalition, supra). That First Amendment protection means nothing if possessing such

repugnant, although constitutionally protected, items can be the basis for an enhanced prison sentence.

The burden for proving the 5000 images are unaltered actual minors engaged in the acts depicted, even by a preponderance of the evidence at a sentencing, remains with the government. Lacey has no duty to disprove that they depict actual minors engaged in the acts depicted.

> If the evidentiary issue [of proving a particular image is of an actual minor as opposed to a virtual minor] is a serious problem for the government, as it asserts, it will be at least as difficult for the innocent possessor. (Free Speech Coalition).

The Court of Appeals, however, placed the burden on Lacey. It also embedded a presumption of authenticity in the government's image evidence eliminating its need to prove anything at all with regard to the images.

> Joining our sister circuits, we reject Lacey's argument that the government was required to present any expert evidence, much less testimony from those who created the pornographic images, to establish that the images depicted real as opposed to virtual children. Because Lacey has presented no evidence that would call into question the reality of the children, we hold that the district court's visual inspection was sufficient to support its finding that the images depicted actual children. Appendix B at 10.

Obviously, Lacey had no burden to show the images the government offered were not authentic. The government had the burden to affirmatively show that the images were authentic. The court sidestepped the government's burden by its improper, unreliable visual examination means of authenticating the government's evidence.

Q. JURISDICTIONAL PROBLEM

It is well settled that a valid guilty plea waives all non-jurisdictional defects in the indictment. See, e.g., United States v. Chantal, 902 F.2d 1018, 1020 (1st Cir. 1990); A valid guilty plea does not waive jurisdictional defects, however. See United States v. Broce, 488 U.S. 563, 569 (1989); United States v. Montilla, 870 F.2d 549, 552 (9th Cir. 1989).

Rule 11(f) of the Federal Rules of Criminal Procedure provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." The court need not satisfy itself that a jury would find the defendant guilty, or even that defendant is guilty by a preponderance of the evidence. United States v. Maher, 108 F.3d 1513, 1524 (2nd Cir. 1997). The district court must "assure itself simply that the conduct to which the [appellant] admits is in fact an offense under the statutory provision under which he is pleading guilty." Id.

The government produced no evidence on this question. It did not present any evidence that the images on the hard drives had been mailed, shipped, or transported in interstate commerce. Nor did it offer

evidence that the images, themselves, had been shipped or transported in interstate commerce. The government failed to provide a factual basis for the interstate jurisdictional element.

Although Lacey did not object to this failing, this does not materially alter the inquiry this court makes. This court's "review [] for sufficiency of the evidence and plain error review usually involve substantially the same inquiry." United States v. Lawrence, 405 F.3d 888, 900 n.7 (10th Cir. 2005), cert. denied, 126 S.Ct. 468 (2005); see also United States v. Swanson, 360 F.3d 1155, 1162 (10th Cir. 2004) (two inquiries "'essentially the same'") (quotation omitted); United States v. Duran, 133 F.3d 1324, 1335 n.9 (10th Cir. 1998) ("largely the same exercise").

This Court, thus, reviews the record de novo to decide whether, viewing the proof in the light most favorable to the government and giving it the benefit of all reasonable inferences from that proof, a reasonable jury could find all elements of the offense beyond a reasonable doubt. Swanson, 360 F.3d at 1162. With no evidence on the interstate commerce element with respect to the visual depictions on the hard drives, the possession conviction cannot stand.

Accordingly, this Honorable Court should vacate the judgment of the district court on the single count and remand with instructions to dismiss this count.

R. GOVERNMENT FAILED TO ESTABLISH "INTERSTATE COMMERCE" ELEMENT

The government failed to present the various kinds of proof that are commonly used in computer cases

such as this one to satisfy the in commerce element. It did not show where the server that connected Lacey to the Internet service was located. There was no demonstration that his internet service provider's server was outside of New York. While it is true that many Internet transmissions cross state or national borders, it is not inevitably so. If all of the servers involved are all in one state, then the transmission did not cross state lines.

The statutory phrase that visual depictions have been "shipped or transported in interstate commerce" requires that the transmission move between states. There was no proof provided in the form of statements made by the appellant or through the facts presented by the Government which would have established the jurisdictional element.

Evidence concerning Lacey's use of the Internet, standing alone, was not sufficient to establish that the child-pornography images at issue moved across state lines, as required to sustain convictions for possession of images involving the sexual exploitation of minors. 18 U.S.C. §2252(a)(4)(B). United States v. Schaefer, 501 F.3d 1197 (10th Cir. 2007). At least one (1) court has held that an Internet transmission, standing alone, do not satisfy interstate commerce requirement of the statute. Schaefer, 501 F.3d at 1200-01.

The government had to show the transmissions involving the images crossed state lines just prior to arriving on his computer to satisfy the requirement that they had been "shipped or transported interstate commerce." In fact, the mere fact that at some point a previous copy of the depictions was out of state is insufficient. Lacey was indicted for possessing the

specific four depictions found on the seized computer. He was not indicted for any conduct with regard to any prior copies of those depictions that were not on the seized computer. It is, of course, completely unknown whether the depictions on Lacey's computer were originals or copies of copies, etc.

Authority holding that transmission of an image over the Internet alone satisfies the jurisdictional element fails to take account of the text of the statute and is otherwise unpersuasive.

With no proof that the transmissions of the visual depictions in this case traveled interstate, the proof was lacking on the statutory element, and therefore, Lacey was found guilty in error.

CONCLUSION

Based upon the foregoing, Lacey requests this Court dismiss Lacey's case for failure of the District Court to have jurisdiction over this matter and, in the alternative, remand his case to the District Court for re-sentencing consistent with the arguments contained in this petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 08-2515

[Filed June 12, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
STEVEN LACEY,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the Southern District of Illinois.
No. 07 CR 40052—**Michael J. Reagan**, *Judge.*

ARGUED FEBRUARY 20, 2009
DECIDED JUNE 12, 2009

Before BAUER, MANION, and SYKES, *Circuit Judges.*

MANION, *Circuit Judge*. Steven Lane Lacey pleaded guilty to possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The district court sentenced him to 108 months' imprisonment. Lacey appeals, challenging both his conviction and his sentence. We affirm.

I.

While investigating two Yahoo groups transmitting images of child pornography over the internet, Federal Bureau of Investigation agents traced one of the images to 47-year-old Stephen Lane Lacey, who posted the image of a nude prepubescent female engaged in oral sex with an adult male. When the agents interviewed Lacey at his workplace, he admitted to trading child pornography over the Internet since 1996. He also admitted that he used one of his two home computers to share and view child pornography. Agents seized a computer hard drive and several CD-ROMs after Lacey consented to a search of his home. The items seized contained several thousand still images and approximately two dozen videos of child pornography.

Lacey was indicted and pleaded guilty to one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). At the change of plea hearing, the district court asked Lacey, among other things, if the government could prove beyond a reasonable doubt the "jurisdictional element" of a § 2252A(a)(5)(B) violation—that the child pornography "had been transported, shipped or mailed in interstate or foreign commerce, including by computer." Lacey responded, "Yes, sir." Later, while reciting the factual basis for the plea, the government's attorney asserted that the

"images have traveled in interstate commerce to end up in . . . Illinois." The court asked Lacey if the government could prove that averment beyond a reasonable doubt; Lacey again responded, "Yes, sir." Based on those affirmations, the court accepted Lacey's plea.

Prior to sentencing, Lacey advanced several objections to the presentence report ("PSR"). Among those objections was his claim that he was not subject to a five-level enhancement under U.S.S.G. § 2G2.2(b)(7)(D) for possessing over 600 images of child pornography. Instead of the 5,000-plus images attributed to him in the PSR, Lacey insisted he was only responsible for the four images listed in the indictment and to which he pleaded guilty of possessing. According to Lacey, any amount over the four images was unreliable because the government had not produced evidence that any of the other images depicted actual minors as opposed to computer-generated "virtual" children.

After a thorough review of the images, the district court rejected Lacey's objection and applied the enhancement. It gave several reasons for doing so. First, the court discussed twelve of the video images the PSR included as relevant conduct.[1] It found that the videos featured actual children because, to the court's knowledge, making a movie with virtual actors who were indistinguishable from real actors was

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[1] The PSR listed 25 video files as relevant conduct. However, the district court, after examining the videos, culled that number down to 12 after excluding the videos that were either duplicates or did not clearly depict minors.

impossible. Because the Guidelines treat twelve videos of child pornography as equivalent to over 600 still images, the court found the five-level enhancement justified on that basis alone.

Next, the court turned to the still images recovered from Lacey's computer and the CD-ROMs in his possession. Discarding duplicate images, those of poor quality or small size, and any image that did not clearly portray minors, the district court narrowed the total number listed in the PSR to around 2,000 images. The court stated that it visually inspected those remaining images, stopping its inspection only after it had determined that there was "no question" that at least 1,000 of them involved real children. The court noted its calculation was consistent with the government's report from the National Center for Missing and Exploited Children ("NCMEC"),[2] which concluded that at least 1,222 of the images from Lacey's hard drive and his CD-ROMs involved real children. On those bases, the district court applied the enhancement.

In addition to the five-level enhancement under § 2G2.2(b)(7)(D), the district court added a four-level enhancement under U.S.S.G. § 2G2.2(b)(4) for material that portrayed sadistic and masochistic conduct. The court identified two images and one video that justified the enhancement: a photograph of a child being sexually abused while blindfolded; another image of a child, blindfolded with hands bound and a rope around the neck, who was being sexually abused; and a video

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[2] The NCMEC maintains a database of known victims of child pornography, which can be used for purposes of comparison.

of a young child screaming and crying as she was raped by an older man. After applying that enhancement, the court calculated Lacey's offense level at 33 and his sentencing range at 135 to 168 months' imprisonment. The statutory maximum for Lacey's offense was ten years, and the court imposed a sentence of 108 months' imprisonment. Lacey appeals.

II.

On appeal, Lacey first challenges the evidence establishing the jurisdictional element of his § 2252A(a)(5)(B) conviction.[3] He argues that the government did not produce any evidence that the images found on his hard drive and CD-ROMs had been transported in interstate commerce. Lacey acknowledges that he did not raise this issue in the district court and that a guilty plea ordinarily waives all objections to a conviction. *See, e.g.*, *United States v. Harvey*, 484 F.3d 453, 455 (7th Cir. 2007). However, Lacey contends that a sufficiency challenge to the jurisdictional element cannot be waived. In the alternative, he argues that the district judge failed in his obligation under Federal Rule of Criminal Procedure 11(b)(3) to satisfy himself that there was a factual basis for the jurisdictional element of Lacey's conviction.

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[3] During oral argument, Lacey's attorney also attempted to challenge the constitutionality of § 2252A as applied to the Internet. In his appellate brief, however, Lacey specifically states that he is *not* challenging the constitutionality of that statute. Appellant br. at 11-12. He has therefore waived any such argument.

Section 2252A(a)(5)(B) proscribes knowing possession of child pornography "that has been mailed, or shipped or transported . . . in or affecting interstate or foreign commerce by any means, including by computer." That quoted language is commonly referred to as the "jurisdictional element" of the offense. *See United States v. Anderson*, 280 F.3d 1121, 1125 (7th Cir. 2002). Lacey claims that his challenge to that element of the offense cannot be waived by his guilty plea due to its jurisdictional nature.

Lacey correctly notes that a guilty plea does not waive certain jurisdictional challenges to a conviction—challenges that go "to the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge v. Perry*, 417 U.S. 21, 30 (1974); *see also United States v. Bell*, 70 F.3d 495, 496-97 (7th Cir. 1995). However, contrary to Lacey's contention, his attack on the evidence supporting the jurisdictional element of his § 2252A(a)(5)(B) conviction is not that type of jurisdictional challenge. A "jurisdictional element" is simply an element of a federal crime. It is jurisdictional "only in the shorthand sense that without that [interstate commerce] nexus, there can be no federal crime . . . . It is not jurisdictional in the sense that it affects a court's subject matter jurisdiction, *i.e.*, a court's constitutional or statutory power to adjudicate a case, here authorized by 18 U.S.C. § 3231." *United States v. Martin*, 147 F.3d 529, 532 (7th Cir. 1998) (internal citation omitted). As an offense element, it does not implicate the court's power to hear a case and can be waived by a guilty plea—as it was here. *See Milhem v. United States*, 834 F.2d 118, 120 (7th Cir. 1987) (noting that "a plea of guilty to an offense constitutes a waiver of any claim of

insufficiency of proof on any element of that offense"). Because Lacey has not asked to set aside his guilty plea, we will not entertain his challenge to the sufficiency of the evidence supporting the jurisdictional element of his § 2252A(a)(5)(B) conviction.

Lacey's other claim—that the district court failed to sufficiently apprise itself of the factual basis for Lacey's plea—is contradicted by the record. At the change of plea hearing, Lacey admitted—twice—that such a factual basis existed. First, when reciting the elements of the crime, the district court specifically asked Lacey if he agreed that the government could prove that the child pornography was "transported, shipped or mailed in interstate or foreign commerce . . . as charged," to which he replied, "Yes, sir." Second, after the government set forth the factual basis for the plea, which included that the images of child pornography had "traveled in interstate commerce," the court asked Lacey if the government could prove all it had recited beyond a reasonable doubt, to which he again replied, "Yes, sir." Those admissions are sufficient to establish a factual basis for the jurisdictional element of the § 2252A(a)(5)(B) offense. *Cf. United States v. Turner*, 272 F.3d 380, 389-90 (6th Cir. 2001) (finding government's contention that it was prepared to prove conspirators "had purchased items that moved in interstate commerce in preparation for the crime" sufficient to establish the factual basis for the jurisdictional element of the Hobbs Act offense). We therefore reject Lacey's challenge to his conviction.

In addition to challenging the jurisdictional element of his conviction, Lacey argues that the district court committed two errors at sentencing.

First, Lacey contends that the district court erred in finding that the offense involved more than 600 images of child pornography, a finding which increased his guidelines range five levels under U.S.S.G. § 2G2.2(b)(7)(D). "We review a district court's application of the sentencing guidelines *de novo*, but defer to the court's finding of facts unless they are clearly erroneous." *United States v. Irby*, 240 F.3d 597, 599 (7th Cir. 2001).

Relying on *United States v. Frabizio*, 445 F. Supp. 2d 152 (D. Mass. 2006), Lacey claims that the district court's visual inspection of the images was insufficient to find that they were images of actual minors as opposed to virtual ones.[4] In *Frabizio*, the district court concluded that visual inspection alone was insufficient to differentiate real children from virtual ones. 445 F. Supp. 2d at 155. The district court therefore required further extrinsic evidence beyond visual inspection—though what specifically that would entail (other than an "expert with greater knowledge of computers"), the court did not say. *Id.* at 159. Lacey would have us go even farther than *Frabizio*; he argues that "[w]ithout testimony of a person who participated in the *creation* of a digital image, no authenticity of the claimed images can be determined." Appellant br. at 13 (emphasis added).

Lacey's reliance on *Frabizio* is misplaced. Not only is *Frabizio* a district court case that is not precedential authority, *Matheny v. United States*, 469 F.3d 1093,

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[4] The Supreme Court held in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), that the First Amendment protects the possession of virtual images of child pornography.

1097 (7th Cir. 2006), but also it is no longer good law. After the district court's decision in *Frabizio*, the First Circuit definitively held, contra *Frabizio*, that the government is not required to present any further evidence of the reality of the children depicted other than the pictures themselves. *See United States v. Rodriguez-Pacheco*, 475 F.3d 434, 441-42 (1st Cir. 2007).[5] In so holding, the First Circuit was simply echoing what every other court of appeals confronting this issue has concluded: expert evidence is not required to prove the reality of children portrayed in pornographic images. *See United States v. Salcido*, 506 F.3d 729, 733-34 (9th Cir. 2007) (per curiam) ("We agree with every other circuit that has ruled on the issue that expert testimony is not required for the government to establish that the images depicted an actual minor."); *United States v. Irving*, 452 F.3d 110, 120-22 (2d Cir. 2006) (rejecting appellant's claim that the government must produce evidence extrinsic to the pictures themselves); *United States v. Farrelly*, 389 F.3d 649, 654 (6th Cir. 2004) ("The question of whether the images are virtual or real is one of fact, to be

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[5] The First Circuit held in *United States v. Nolan*, 818 F.2d 1015, 1017-19 (1st Cir. 1987), that a trier of fact, without the assistance of an expert or other evidence, can discern between an actual and virtual image of child pornography. However, in *United States v. Hilton*, 363 F.3d 58, 65-66 (1st Cir. 2004), the First Circuit, relying on *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), moved away from *Nolan* and held that the government was obligated to produce expert testimony to establish the reality of an image of child pornography. The First Circuit later withdrew that opinion, *United States v. Hilton*, 386 F.3d 13 (1st Cir. 2004), but the status of *Nolan* remained in doubt until *Rodriguez-Pacheco*, which reaffirmed the holding in *Nolan*. The district court in *Frabizio* issued its ruling during that interim of uncertainty. *See Frabizio*, 445 F. Supp. 2d at 156-57.

determined by evidence about which argument can be made to the jury."), *abrogated on other grounds by United States v. Williams*, 411 F.3d 675, 677 n.1 (6th Cir. 2005); *United States v. Slanina*, 359 F.3d 356, 357 (5th Cir. 2004) (per curiam) (holding extrinsic evidence was not required to prove reality of children in images); *United States v. Deaton*, 328 F.3d 454, 456 (8th Cir. 2003) (per curiam) (holding that the "pictures themselves support the district court's determination that the images were plainly of children under age 12, and depicted actual children"); *United States v. Hall*, 312 F.3d 1250, 1260 (11th Cir. 2002) (reviewing for plain error and determining from the pornographic pictures themselves that "no reasonable jury could have found that the images were virtual children created by computer technology as opposed to actual children").

Joining our sister circuits, we reject Lacey's argument that the government was required to present any expert evidence, much less testimony from those who created the pornographic images, to establish that the images depicted real as opposed to virtual children. Because Lacey has presented no evidence that would call into question the reality of the children, we hold that the district court's visual inspection was sufficient to support its finding that the images depicted actual children. *See Irving*, 452 F.3d at 121. In addition, we note that the district court, in its thorough oral discussion of this issue, based its finding not just on its visual inspection alone; it also compared its observations with the NCMEC report to confirm that the images involved real children. *See*

United States v. Hoey, 508 F.3d 687, 691 (1st Cir. 2007) (relying on similar NCMEC report).[6]

Lacey's second challenge to his sentence is easily dispatched. Lacey contends that the Sixth Amendment, as interpreted in *Blakely v. Washington*, 542 U.S. 296 (2004), and its progeny, required a jury and not the district court to determine contested factual issues at sentencing, such as how many images Lacey possessed, if each image depicted an actual minor, and whether an image depicted sadistic or masochistic conduct. That argument has no merit. *See United States v. White*, 472 F.3d 458, 464 (7th Cir. 2006) (characterizing this line of argument as "frivolous"). "In the aftermath of *Booker*, the sentencing guidelines are construed as advisory, not mandatory. We have repeatedly held . . . that sentencing enhancements need not be found by a jury beyond a reasonable doubt because they no longer alter the statutory maximum." *Id.* (internal citation omitted). Because Lacey was sentenced below the statutory maximum of ten years for his offense, his argument is unavailing.

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[6] We note an alternative ground for affirming the district court's application of the enhancement: the twelve videos on Lacey's computer that the district court found contained child pornography. On appeal, Lacey does not challenge the district court's finding that those videos contained real children. As those videos by themselves support the five-level enhancement, *see* U.S.S.G. § 2G2.2 application note 4(B)(ii) (2007), Lacey's challenge to the court's reliance on its visual inspection of the still images makes no difference to his sentence.

III.

Lacey's plea of guilty waived his challenge to the jurisdictional element of his § 2252A(a)(5)(B) conviction. Moreover, the district court, relying on Lacey's admissions during the change of plea hearing, sufficiently apprised itself of the factual basis for the jurisdictional element. Regarding Lacey's sentence, the district court correctly enhanced his sentence five levels under U.S.S.G. § 2G2.2(b)(7)(D) for possessing over 600 images of child pornography based on the numerous images and videos he possessed. Moreover, because the court sentenced Lacey below the statutory maximum, no Sixth Amendment violation occurred. We therefore AFFIRM Lacey's conviction and sentence.

6-12-09

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

Case Number: 4:07-CR-40052-001-MJR
USM Number: 49559-018

[June 5, 2008]

UNITED STATES OF AMERICA	)
	)
V.	)
	)
STEVEN LANE LACEY	)
	)

JUDGMENT IN A CRIMINAL CASE

Michael K. Radloff
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

* * *

The defendant is adjudicated guilty of these offenses:

Title & Section
18 U.S.C. §2252A(a)(5)(B)

Nature of Offense
Possession of child pornography

Offense Ended
09/09/2004

Count
1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 5, 2008
Date of Imposition of Judgment

/s/ Michael J. Reagan
Signature of Judge

MICHAEL J. REAGAN, U.S. DISTRICT JUDGE
Name and Title of Judge

June 5, 2008
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

108 months

* * *

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Life

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days after being released on supervision and at least two

periodic drug tests thereafter, not to exceed 52 tests in a one year period.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☒ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

* * *

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any personconvicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer and the Financial Litigation Unit of the United States Attorney's Office with access to any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation. The defendant shall immediately notify the probation officer of the receipt of any indicated monies.

While incarcerated and/or while on supervised release, the defendant shall participate in an approved sexual offender treatment program, at his own expense, as directed by the probation officer. If deemed necessary, the defendant shall submit to an approved, sexual-predator evaluation. The defendant shall abide by all rules, requirements, and conditions of the treatment program, including submission to polygraph and/or plethysmograph examination, at his own expense, to determine if he is in compliance with the conditions of his release. The defendant shall remain in the program until successfully completed, or until such time as the defendant is released from the program by the Court and/or probation officer.

The defendant shall permit the probation officer to have access to any personal computer and/or electronic device capable of accessing the Internet, World Wide Web, and Electronic Mail. The defendant shall also allow the probation officer or designee to conduct

regular searches of his computer using software monitoring devices if determined necessary by the probation officer. While on supervised release, the defendant should advise the probation officer of all e-mail addresses he uses on both public and private computers. The defendant shall consent to third party disclosure to any employer or potential employer, concerning any computer-related restrictions that my be imposed upon you. The defendant shall warn other residents or occupants of his home that computer systems will be subject to inspection by the probation officer and/or authorized contractor.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 17,500.00	$

* * *

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

* * *

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

* * *

D ☒ Payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $ 150.00 over a period of 120 months (e.g., months or years), to commence 30 days (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

* * *

F. ☒ Special instructions regarding the payment of criminal monetary penalties:

Payments are due immediately, through the Clerk of the Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

[ ] BENTON [X] EAST ST. LOUIS

MINUTES OF DISPOSITION

U.S.A. vs. STEVEN LANE LACEY

CRIMINAL NO. 07-CR-40052-001-MJR

DEFT. COUNSEL: Michael K. Radloff,

JUDGE: HON. MICHAEL J. REAGAN

GOVT. COUNSEL: George Norwood

DATE: June 5, 2008 (continued from 5/30/2008)

REPORTER: Barb Kniepmann

DEPUTY: Annie McGraw

TIME: 09:10 - 10:10 AM

__X__ COURT ORDERS PRE-SENTENCE REPORT TO BE SEALED WITH COUNSEL HAVING ACCESS TO SAME IN THE EVENT OF APPEAL. RECOMMENDATION TO BE PLACED UNDER SEPARATE SEAL AND COUNSEL WILL NOT HAVE ACCESS TO SAME.

COURT'S RULINGS ON OBJECTIONS TO PRE-SENTENCE REPORT: **Overruled**

* * *

OFFENSE LEVEL: 33
CRIMINAL HISTORY CATEGORY: I

SENTENCE RANGE: 135-168 months (120 months maximum)

FINE RANGE: $17,500.00-$ 175,000.00

* * *

____ CUSTODY OF ATTORNEY GENERAL
_X_ CUSTODY OF BUREAU OF PRISONS

SENTENCE: Defendant is sentenced to 108 months imprisonment .

_X_ UPON RELEASE FROM IMPRISONMENT, DEFENDANT ON SUPERVISED RELEASE LIFE

CONDITIONS OF SUPERVISION/PROBATION:

[X] WITHIN 72 HOURS OF RELEASE FROM BOP, DEFENDANT TO REPORT TO PROBATION IN DISTRICT RELEASED.

[X] DEFENDANT SHALL NOT COMMIT ANY FURTHER CRIMES.

[X] DEFENDANT SHALL NOT POSSESS FIREARM OR OTHER DESTRUCTIVE DEVICE.

[X] DEFENDANT SHALL NOT ILLEGALLY POSSESS ANY CONTROLLED SUBSTANCES.

* * *

[X] Defendant shall pay the fine in installment os of $150 per month or ten percent; provide prob and FLU of US Attorney's Office with access to req. fin info; apply all monies received...to the outstanding court ord. Fin obligation; participate in a sexual offender treatment program; submit his person ....to a search; and cooperate in collection of DNA.

[X] DEFENDANT FINED $17,500.00 On (each of) Count(s) 1 for a TOTAL FINE of $17,500.00 DUE IMMEDIATELY.

[X] INTEREST WAIVED
[ ] INTEREST IMPOSED

* * *

[X] SPECIAL ASSESSMENT OF $ 100.00 On (each of) Count(s) 1 TOTAL $100.00 DUE IMMEDIATELY.

* * *

[X] COURT FINDS DEFENDANT'S FINANCIAL CONDITION IS SUCH THAT [S]HE IS UNABLE TO:

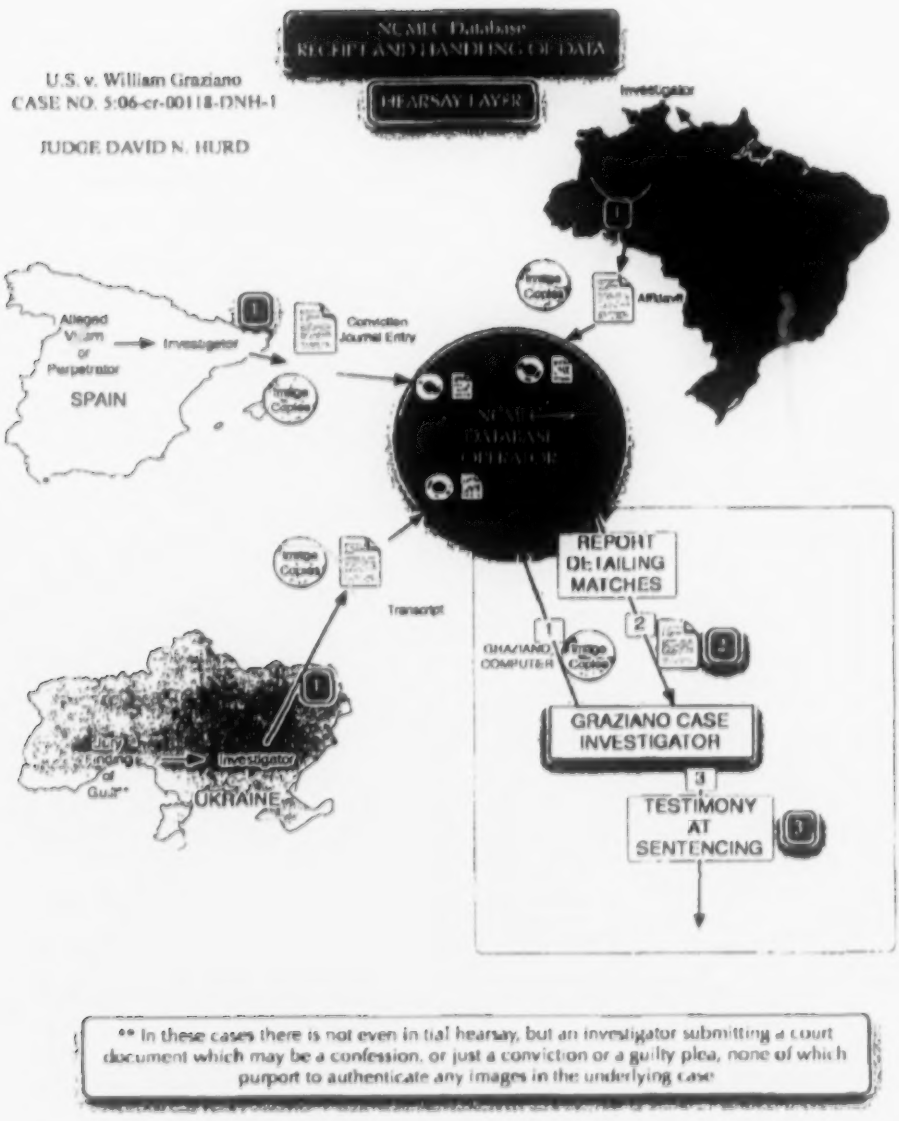
[ ] PAY RESTITUTION, [ ] PAY A FINE, [X] PAY COSTS OF INCARCERATION OR SUPERVISION, AND THEY ARE WAIVED.

[X] DEFENDANT ADVISED OF RIGHT TO APPEAL.

* * *

[X] All Government and defense exhibits admitted on 5/30/2008 are upon oral motion withdrawn. Court's Exhibit #1, Printout of Lacey video, and Court's # 2, printout of the file names are SEALED.

APPENDIX D


NCMEC Database
RECEIPT AND HANDLING OF DATA
HEARSAY LAYER
U.S. v. William Graziano
CASE NO. 5:06-cr-00118-DNH-1
JUDGE DAVID N. HURD
Investigator
Affidavit
Alleged Victim or Perpetrator
Investigator
SPAIN
Conviction Journal Entry
Image Copies
NCMEC DATABASE OPERATOR
Transcript
REPORT DETAILING MATCHES
GRAZIANO COMPUTER
GRAZIANO CASE INVESTIGATOR
TESTIMONY AT SENTENCING
Investigator
UKRAINE
** In these cases there is not even in tial hearsay, but an investigator submitting a court document which may be a confession, or just a conviction or a guilty plea, none of which purport to authenticate any images in the underlying case